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ALEXANDER L. STEVAS,
CLERK

82-2057

No. .....

The Supreme Court of the United States

October Term, 1982

DONALD LESIAK,

Petitioner,

vs.

THOMAS E. FERGUSON,

AUDITOR OF THE STATE OF OHIO,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

CREDE CALHOUN
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118 St. Clair Avenue, N.E.
Cleveland, Ohio 44114
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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT
(Dated March 16, 1983)

No. 83-45

THE SUPREME COURT OF OHIO
THE STATE OF OHIO
City of Columbus

Donald Lesiak,)
Appellant,)
vs.)
Thomas E. Ferguson et al.,)
Appellees.)

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

JOURNAL ENTRY AND OPINION
OF CUYAHOGA COUNTY COURT OF APPEALS
(Dated November 10, 1982)

NO. 44596

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Donald Lesiak — APPEAL FROM

APPELLANT — COMMON PLEAS COURT

vs. — No. 008,235

Thomas E. Ferguson, et al.

APPELLEES

JACKSON, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed.

Each assignment of error was reviewed and upon review the following disposition made:

SEE OPINION, JACKSON, J., ATTACHED HERETO AND INCORPORATED BY REFERENCE

OPINION

SYLLABUS

1. Where a public employee is fired for disclosing information to the press, the following factors must be considered in evaluating whether the employee's dismissal is consistent with the First Amendment guarantee of freedom of speech: (1) The public importance of the information disclosed; (2) the truth or falsity of the statements made by the employee, and the employee's knowledge of their truth or

falsity; (3) whether the employer has established a policy of confidentiality, and the justification for such a policy; and (4) the degree, if any, to which the employee's ability to efficiently perform his or her duties has been impaired by reason of the disclosures. The fourth of these considerations does not condone the termination of a public employee merely because the employee has angered those who are the subject of the disclosures.

2. Public disclosure of official wrongdoing is in the highest public interest. However, employees of public investigative bodies may do more harm than good when they violate their employer's policy of confidentiality and make premature allegations of wrongdoing during the course of an investigation. The disclosure of such information by a public employee may,

consistent with the First Amendment, serve as the basis for dismissal of the employee where there is no indication that the public employer wrongfully attempted to hinder or to conceal the results of the investigation.

JACKSON, J.:

Appellant was dismissed from his job with the office of the State Auditor after sending a letter and granting an interview to a newspaper concerning the events which led the City of Cleveland to default on its obligations. The State Board of Personnel upheld his dismissal, and he appealed to the Court of Common Pleas pursuant to R.C. §119.12. The Court of Common Pleas affirmed the decision of the Personnel Board, and the appellant has

appealed to this court, assigning three errors for review.[1/]

Part I of this opinion sets forth the factors to be considered in balancing the interests of the appellant, his former employer the State Auditor, and the public. In Part II the evidence of the appellant's violation of the Auditor's "press policy" is set forth. In Part III, the law is applied to the facts.

1/

Assignment of Error No. 1
The judgment of the trial court violates the rights of the public and of the appellant under the first amendment of the United States Constitution guarantying [sic] freedom of speech.
Assignment of Error No. 2
The judgment of the trial court was not supported by evidence or by reliable, probative and substantial evidence, and was against the manifest weight of the evidence.
Assignment of Error No. 3
The Hearing Officer and the trial court committed error in preventing a full cross-examination of the Auditor and his witnesses on relevant subjects.

(Footnote 1 concluded on next page.)

I. FIRST AMENDMENT CONSIDERATIONS

Appellant's main contention is that the Auditor's decision to terminate his employment was in violation of the First Amendment to the United States Constitution, guaranteeing freedom of speech to all persons.

The leading case on this subject is Pickering v. Board of Education (1968), 391 U.S. 563. Pickering was a teacher in Will County, Illinois, who was dismissed for writing a letter to the editor of his local newspaper criticizing the Board of Education for allocating more money for athletics, and less for education than

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(Conclusion of Footnote 1)
The appellant's third assignment of error, involving an evidentiary matter, is summarily overruled, because it is not "specifically pointed out in the record and separately argued by brief." App. R. 12(A). The first two assignments of error are argued in the appellant's brief, and are disposed of on the merits.

Pickering thought appropriate. His termination was upheld by the Illinois courts, but the Supreme Court reversed, finding his dismissal to have been in violation of the United States Constitution.

The court recognized that both the public employee and the public employer have interests which must be protected. The majority held that:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."
> 391 U.S. at 568

In the case of public school teachers, the Supreme Court held that:

> "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."
> 391 U.S. at 574-575 (footnote omitted)

The court indicated in Pickering, how-

ever, that each case would have to be decided in view of the facts and circumstances which are present. The court noted, in footnote 3 of its opinion, that:

> "It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases."

The factors to be considered in evaluating the constitutionality of the appellant's termination include the following:

(1) The public importance of the information imparted by the appellant;

(2) The truth or falsity of the statements made by appellant, and his knowledge of their truth or falsity;

(3) The existence of a policy of confidentiality at the time of these events, and the justification for such a policy;

(4) The degree (if any) to which appellant's ability to efficiently perform his duties has been impaired by reason of his disclosures.

The fourth of these considerations does not condone the termination of a public employee who "blows the whistle," because the employee has raised the ire of those who are the subject of his disclosures. As the Supreme Court noted in Pickering,

"***the only way in which the

> [School] Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system . . . cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest." 391 U.S. at 570.

In the case at bar, the courts are required to determine whether appellant's disclosures sufficiently redounded to the public interest so as to justify his violation of his employer's policy of confidentiality.

II. EVIDENCE OF APPELLANT'S VIOLATION OF AUDITOR'S "PRESS POLICY"

There is no dispute that the State Auditor's office had an unwritten policy a-

gainst communication by employees with the media about past or present audits,[2/] and appellant admitted that he was aware of this policy. There is also no dispute that appellant wrote a fifty-six page letter to the publisher of the Plain Dealer, and gave a three hour interview on that subject to a reporter for that newspaper. What is disputed is the necessity for the policy of confidentiality, and the nature of the information disclosed by appellant.

A. Justification for Policy of Confidentiality

Thomas Ferguson, State Auditor, in his testimony before a Hearing Officer of the State Personnel Board of Review, described the "press policy" of the Auditor's office in the following words:

2/ This policy was reduced to writing and included in a manual for employees of the Auditor's office after the appellant was terminated.

> "Well, basically the Auditor of State's office has had a policy as far as public relations and audits are concerned of only have [sic] the public relations department speak to any audits that are released by the Auditor of State's office. It is against our regulations for any individual in the office to talk about an audit in progress or a completed audit." (Tr. 203).

Mr. Ferguson admitted that the "press policy remained unwritten until after appellant had been terminated, but stated that all employees were aware of the policy." (Tr. 203-204). Ferguson testified that he had, on one previous occasion, instructed a Cleveland employee to remind appellant of the "press policy." (Tr. 209). The justification for the policy of confidentiality was described by Ferguson as follows:

> "Q. Could you tell the Hearing Officer, please, why the policy is in effect?
>
> "A. Well, basically we think it's very necessary. For example,

and I think there are two distinct areas here in the policy, and those areas deal with an audit in progress and a completed audit.

"With an audit in progress it -- again, it would be totally unprofessional for anyone to speak about an audit in progress to the media or to anyone other than the individuals directly involved in that audit.

"As far as a completed audit is concerned, here again once an audit is completed, and by that I mean not completed in the field but completed in the office and is actually issued, and we don't consider that a public document until the audit is actually released or issued. Up until that time it is not a public document, but once it is issued it is a public document. Here again we felt it was necessary to insulate our auditors in the field from being faced with, with making statements or criticisms of officials that, they have to go back in and reaudit or do audits on.

"And so, again, part of this policy was really to protect them and their professional standing. And, again, to let the public relations department handle any inquiries that would come on these audits."
(Tr. 204-205).

"***it would be totally unprofessional to talk about an audit in progress or to speak about an audit before that audit is released.

"You could damage a reputation. There are many times that audits, because of the legal, change in, changes in law, court decisions, that those -- the audits are changed by the legal department to conform to the present law. And therefore, you know, it would be very possible that, that what was spoke [sic] about in a post audit conference, that there would be things that would not be in the final audit or it may change form in the final audit.

"And, therefore, if you were to speak about what happened as you were progressing along in the audit, there might be accusations made that would not be true. There could be all kind of misstatements, really."
(Tr. 207-208).

Mr. Ferguson distinguished disclosure of information about a pending audit from disclosure of information about a completed audit, finding the former to be a far more serious violation of the unwritten "press policy":

"Q. Do you consider there to be a distinction between a discussion of a completed audit and a pending audit?

"A. Oh, big distinction. Yeah.

"Q. Would you explain that to the Hearing Officer.

"A. Well, again, it's -- as I've been pointing out, I feel, you know, you really don't discuss a pending audit, period, with anybody but those individuals involved. And by that meaning, I would mean the auditors or the people that you're auditing. You just don't discuss a pending audit.

"Now, again, once an audit is public, that audit -- or is released, that audit is a public document. And, of course, the document speaks for itself as to what it contains. The criticisms it contains, or what criticisms might be there in the work papers or any place else.

"Again, you know, as far as an examiner talking about a, a [sic] audit when it is released I would consider that, of course, a breach of policy. But if only that were involved, I would probably, as I did before with Mr. Lesiak, give him a reprimand or warn him or maybe, at the most, give him a suspension.

"Q. For discussing the completed audit?

"A. For discussing a completed audit, yes." (Tr. 210-211).

According to State Auditor Ferguson, public disclosure regarding pending audits is prohibited because premature publicity might erroneously damage the reputation of an auditee, before the State Auditor's office had determined whether a violation had occurred. Disclosure of information relating to completed audits is prohibited solely to protect examiners from being questioned about public officials whom they may have to audit in the future.

Both of the justifications of the "press policy" offered by the Auditor are constitutionally permissible; but, in a proper case, an employee of the Auditor's office might be justified in violating the "press policy" in order to bring to public attention a matter of consequence, and in

such a case, it would be constitutionally impermissible for the Auditor to discipline the employee. We are also persuaded that the Auditor's policy of confidentiality is far more pertinent to pending audits than to completed audits.

B. Nature of Information Disclosed by Appellant

Appellant Donald Lesiak contends that he contacted the press in order to dispell the impression that he had performed his job poorly as Examiner-in-Charge of auditing financial records of the City of Cleveland from 1976 through 1978. Appellant was reassigned from "Examiner-in-Charge" of the City of Cleveland to "resident examiner" at Cleveland State University on January 15, 1979, one month after the city went into default. This reassignment, which might reasonably be considered a demotion, was announced in a

press release by the State Auditor on January 15, and in a newspaper article appearing in the Plain Dealer on the same day. Appellant's replacement in Cleveland, Mr. William F. Hart, gave an interview describing the city's books as "unauditable," and promising to make them "auditable." Hart stated that the city's most serious problem was that it had been using bond money to meet the general payroll, and that "the city should have been cited for it before."

Four months later, in May of 1979, appellant sent a fifty-six page letter to the publisher of the Plain Dealer, setting forth in great detail every action he took to stem the improper and illegal financial and accounting activities of public officials of the City of Cleveland. Although most of this letter involves completed audits (and points out that the media failed

to publish the findings of those audits), some information was disclosed regarding pending audits. At page four of the letter, Lesiak indicated that during one post-audit conference with Mayor Kucinich in 1978, that he had discussed violations by Mayor Perk between 1973 and 1976, and that they had discussed the use of a computerized accounting system. At pages 9 to 20 of the letter, Lesiak described how at the last four or five post-audit conferences that he had with Mayor Kucinich that he instructed city officials that the monthly computer printouts they received from the Division of Accounts were in error. According to Lesiak, only one municipal department made a positive response to his suggestion; the rest performed "limited and intermittent or nonexistent" reconciliation of accounts.

The main thrust of Lesiak's letter was

that neither city officials nor state auditors had listened to him through the years as he warned them of the city's impending financial crisis. The letter rebukes the State Auditor's office for failing to give his office the necessary personnel to perform its function, and for failing to take action against the City of Cleveland for its many flagrantry [sic] illegal fiscal practices.

In short, the appellant's letter, though verbose, contains little information about pending audits. The appellant's interview with a Plain Dealer reporter, however, is a different matter. During this interview appellant freely discussed pending audits of municipal agencies, and singled out individuals who might be found responsible for misuse of city funds. At one point, appellant told the reporter that he planned to assess the

Clerk of the City Council $122,000 in a "Finding for Recovery," on account of what appellant had considered to be illegal contracts. (Tr. 61, 76-78). He released this information even though he knew that the legal department of the State Auditor's office had not yet reviewed this matter. (Tr. 61). In fact, appellant's only knowledge of this violation was from a draft report prepared by one of his assistants, which had recommended that the $122,000 constituted "payments contrary to statute" and not a "finding for recovery." (Tr. 77).[3/] Appellant explained that he

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3/ As the trial court noted:

"A finding for recovery is extremely significant because it indicates an illegal or unauthorized expenditure such as embezzlement, forgery, overpayment, or misappropriation of public funds. Proper documentation is always required before a finding of recovery is issued by the Auditor of State's Office; suppositions or approximations are insufficient."

intended to change the recommendation to a finding for recovery before transmitting the audit to the State Auditor's office. (Tr. 77-78).

Appellant also told the newspaper reporter that he was going to cite Mayor Kucinich for obstruction of a state audit, and that there might be a finding of recovery against a member of the Civil Service Commission whom he named, whose salary was excessively high. (Tr. 91). Appellant admitted that he spoke about these two audits, and about audits of the Cleveland Personnel Department and Law Department, before these audits had even been reviewed by the State Auditor's office in Columbus. (Tr. 91-92). It therefore appears that appellant's interview with the news reporter contained several serious breaches of the policy of confidentiality with respect to pending, incompleted au-

dits.

III. CONSTITUTIONALITY OF APPELLANT'S TERMINATION

Public disclosure of official wrongdoing is in the greatest public interest. However, employees of investigative bodies may do more harm than good when they make premature allegations of wrongdoing during the course of an investigation.

In the case at bar, appellant's disclosures of information regarding alleged wrongdoings by Mayor Kucinich, the Clerk of Council, and the member of the Civil Service Commission, prior to review of these audits by the State Auditor's office, could have unfairly tarnished the reputation of these individuals.

The public interest is served where conscientious members of watchdog agencies "blow the whistle," if their agency deliberately or inadvertently fails to perform

its duty. However, in the case at bar, appellant went beyond "blowing the whistle," and unnecessarily disclosed sensitive information concerning several pending audits. There is no indication in the record that the State Auditor's office hindered or intended to cover up appellant's investigation of the individuals involved.

While it is certainly possible that the State Auditor terminated appellant because of appellant's criticism of the Auditor's performance, the appellant provided his employer sufficient cause for his termination by disclosing information about uncompleted audits to the Plain Dealer reporter. In the case at bar, the public interest is best served by permitting the State Auditor to terminate appellant's employment.

Accordingly, the decision of the trial

court is affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CELEBREZZE, P.J., CONCURS.

MARKUS, J., CONCURS IN JUDGMENT ONLY

[signature]

JUDGE

LEO A. JACKSON

JUDGMENT ENTRY AND OPINION OF
COURT OF COMMON PLEAS
CUYAHOGA COUNTY
(Dated October 13, 1981)

IN THE COURT OF COMMON PLEAS
OF CUYAHOGA COUNTY

CASE NO. 80-008235

DONALD R. LESIAK)

Appellant)

vs.)

THOMAS E. FERGUSON, et al.)

Appellee)

James J. McMonagle, J.:

This matter comes before this Court as an appeal pursuant to O.R.C. §119.2 and §124.34 from the decision and order of the State Personnel Board of Review entered upon that Board's Journal in case number 79-REM-05-0802 on January 15, 1980, affirming the order of removal by Thomas E. Ferguson, Auditor of the State of Ohio,

and adopting the recommendations of the hearing officer.

The recommendations in the report of the hearing officer under the date of November 29, 1979 found that the appellant Lesiak had violated a press relations policy of the State Auditor's Office, as well as the "confidentiality of closed audit conferences" and that by such violation, appellant "necessarily impeded" his ability to perform his daily duties. The hearing officer held the Auditor had good cause to discipline the appellant and that such conduct constituted insubordination pursuant to §124.34 of the Ohio Revised Code.

Evidence consisted of both the transcript which was filed, the testimony taken before this Court, and the exhibits admitted at all levels of this proceeding. The facts show that Mr. Donald R. Lesiak, the

appellant, was hired by the Auditor's office in August of 1975 as a State Examiner in charge. He became examiner in charge of the City of Cleveland Audits in April of 1976 and he continued in this position until January 15, 1979 when he was transferred to the post of Examiner-in-charge of the Northeastern Ohio University Audits at Cleveland State University.

During his tenure auditing Cleveland, Lesiak attempted to force the State Auditor to take some action to stop the apparent violations of state law and of the Municipal Charter in regards to the financial mismanagement of Cleveland. Among other things, he warned of the poor conditions of the city books and of the pressing need for additional examiners to help the City of Cleveland out of their problems.

During the pertinent time period, 1976

to 1979, there was in existence a "press policy" within the Auditor's office which prohibited the discussion of pending or completed audits with the media. This policy serves to prevent innocent people from being charged with misfeasance in regards to public funds. There is no contention that the appellant was not aware of the prohibition.

The reason for the policy is self evident if one understands the standard procedure for field audit reports:

(1) An audit is assigned to an Examiner by the Examiner in Charge.

(2) An audit is done and an audit report prepared in draft form.

(3) A post-audit conference is held with the Auditor and the Examiner in Charge to discuss the draft audit report.

(4) The Auditees have five (5) days

to respond to the draft audit report after the post-audit conference.

(5) The report is reviewed and signed by the Examiner in Charge and then sent to Columbus for further review.

(6) The Columbus office reviews the report for mathematical and technical accuracy, legal and policy compliance.

(7) The audit is reviewed by a Deputy Auditor.

(8) The audit report is typed up.

(9) The audit report is given to the Public Relations Department for release as an official public document of the Auditor of State.

An audit is not complete until it is released. Up until then, an audit is considered 'in progress' and is confi-

dential. This confidentiality extends to the post-audit conferences that the Examiner in Charge has with the Auditees. Changes may occur in an audit report after it gets to Columbus.

(Report and Recommendation of John S. Jones, Hearing Officer of State Personnel Board of Review, pp. 2-3)

On December 13, 1978, two days before the City of Cleveland went into default, Lesiak prepared a memorandum to his superior in Columbus in which he outlined the problem areas and recommended specific action by the Auditor. Some of the action recommended by Lesiak included the creation of a special auditing team, the use of extraordinary legal remedies to require the City officials to cooperate in solving these problems and to supply needed information; and also a plan whereby the urgency of the situation would be made known to the general public as a whole.

On January 15, 1979, Lesiak was transferred to the Northeastern Ohio University Audits, and after this transfer the Auditor's office issued press releases and articles appeared in the Cleveland Plain Dealer which strongly insinuated that the chaos in Cleveland's books was due to Lesiak's deficiencies; that City officials should have been cited long ago for their fiscal mismanagement and Lesiak's successor, one William Hart, would take the necessary action.

Mr. William Hart testified before this Court and stated that upon his being informed that he was going to be Lesiak's successor that [sic] he received a phone call from a Mr. Robert Holden, a reporter from the Cleveland Plain Dealer, and that Mr. Holden appeared at his home where a short interview was had and photographs of Mr. Hart were taken. Many of the matters

discussed at that meeting between Holden and Hart were published in the Cleveland Plain Dealer. After the articles appeared, Mr. Lesiak then made a written request upon the Auditor to rectify the false impressions which he said were created by the newspaper articles. Lesiak contended that these slurs would hinder his professional reputation and, therefore, he requested a retraction. Said request went unanswered by the Auditor of the State.

Upon receiving no satisfaction, Lesiak then wrote a 56-page letter to the publisher of the Cleveland Plain Dealer detailing the circumstances of his tenure as examiner in charge of the Cleveland audits. Further, on May 2, 1979, Lesiak also participated in a three-hour interview with a Plain Dealer reporter.

On May 4, 1979, an order of removal was served by the Auditor charging Lesiak

with violating the Auditor's "press relations policy" - specifically by participating in a media interview about "administrative procedures and policies regarding field audits" and by "sending of written documents regarding field audits" to the Plain Dealer. Mr. Thomas Ferguson, the Auditor of the State of Ohio, testified under cross examination both before the State Hearing Officer and also before this Court. He stated that during the period preceding default that his hands were tied and that there was no legal basis upon which he could attempt to prevent or avoid financial default by the City of Cleveland. His view of his actions and duties at that time was simply that he could not do anything except to sway public pressure by means of the release of an audit or finding against the City of Cleveland; and that, therefore, he was not

derelict in his duties and was not a causative factor nor a preventive factor in the demise of the City of Cleveland.

Mr. Ferguson's testimony is contradicted by the steps he took in pursuing matters in cities other than Cleveland in attempting to have them recognize their problems. Appellant also claims in this matter that his transfer was for purely political motives, that the auditor was trying to make Mr. Lesiak the scapegoat for the Auditor's own failure to act during the crisis that was affecting the City of Cleveland. Mr. Lesiak also says that because of the political party affiliation between the Mayor of the City of Cleveland at that time and the Auditor of State that [sic] there was in fact a "cover-up" by the parties.

On November 29, 1979, the Hearing Officer of the State Board [sic] Personnel

Board of Review found that Lesiak had violated a press relations policy of the State Auditor's Office, as well as the "confidentiality of closed audit conferences"; and by such violation Lesiak "necessarily impeded" his position and ability to perform his daily duties. In other words, the Hearing Officer agreed with the Auditor and found that the Auditor had "good cause to discipline Lesiak and that his conduct constituted insubordination within the meaning of the Ohio Revised Code Section 124.34." On January 15, 1980, the State Personnel Board of Review affirmed the Auditor's office and adopted the findings and recommendations of the Hearing Officer.

This matter is now on appeal before this Court pursuant to §119.12 which states in part that "the court may affirm the order of the agency complained of in

the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted that the order is supported by reliable, probative and substantial evidence and it is in accordance with the law." This section of the Revised Code means that the Court must give consideration not only to the entire record but also to such other testimony as it has admitted and that it must "appraise all such evidence as to the credibility of witnesses, the probative character of the evidence, and the weight to be given and if from such consideration it finds that the Board's order is not supported by reliable, probative and substantial evidence and it is not in accordance with law the court is authorized to reverse, vacate or modify the order of the Board." See Andrews vs. Board of Liquor, 164 Ohio St. 275, 131 N.E. 2d 390 (1955). The defini-

tion of what is meant by reliable, probative and substantial is contained in the case of Ohio Real Estate Commission vs. Cohen, 90 Ohio L. Abs. 137, 146, 187 N.E. 2d 641, (1962).

> The evidence must be "reliable, that is, dependable with reasonable assurance of its probability as not only truthful but also true. Probative relates to the evidentiary value of the testimony and other evidence in an analytical sense having depth and being more than superficial or speculative. Substantial would appear to mean that the evidence has body or substance of sufficient degree to be of some weight, . . ., as well as dependable and trustworthy. The consideration of all of this would appear to the undersigned to indicate that an order by an administrative agency is one not lightly arrived at but resulting from strongly supported claims that can be resolved without serious doubt of the correctness, as well [as] of the justice, of the order made.

The record below indicates that in Mr. Lesiak's discussions and communications with the Cleveland Plain Dealer, he revealed the following:

1. Page 4 of Lesiak's letter to the

Cleveland Plain Dealer discussed a post audit conference held with Mayor Dennis Kucinich on February 14, 1978.

2. Page 19-20 of the letter revealed information about four or five other post audit conferences during the Kucinich administration.

3. Although an audit of council and of the Clerk of Council was is progress at the time, Lesiak disclosed to the Plain Dealer reporter that he planned to make a "finding for recovery"[1/] against various individuals or business or law firms for violations of the Cleveland City Charter.

1/ A finding for recovery is extremely significant because it indicates an illegal or unauthorized expenditure such as embezzlement, forgery, overpayment, or misappropriation of public funds. Proper documentation is always required before a finding of [sic] recovery is issued by the Auditor of State's Office; suppositions or approximations are insufficient.

4. Page 4 of the letter discusses a "Former Mayors [sic] Violation of oath of office" p. 4.

5. Page 6 refers to information regarding the "awarding of an illegal contract" p. 6.

6. Page six of the letter also refers to illegal negative fraud [sic; = "fund"] balances p. 6.

7. Also on page 6, compliance with City charter is discussed.

Lesiak now claims that his transfer to the University Audits and subsequent dismissal was purely political and that the Auditor was trying to make Lesiak the scapegoat for all of the Auditor's failure to act during the crisis affecting the City of Cleveland. Furthermore, Lesiak maintains that the Auditor's press releases and actions defamed him and besmirched his reputation. He, therefore,

says that he was justified in using the media to counter the Auditor's remarks. Moreover, Lesiak claims to be protected as a citizen by the First Amendment's right of free speech, in criticizing his superiors and their handling of the Cleveland Audits. Thus, if he was discharged for commenting to the press, Lesiak maintains that his discharge was illegal and unconstitutional.

The question before this Court is not one which is simple to formulate nor clear to decide. Simply stated, the facts in this case raise the issue of "whether or not a public employee who was cognizant of a rule which prohibits him from talking to the press about work in process is protected by the First Amendment Right of Free Speech."

Clearly a government employee does not surrender his constitutional right of

freedom of speech simply by virtue of his employment status. Perry vs. Sindermann, 408 U.S. 593, 92 Sup.Ct. 269, 33 L.Ed.2d 570 (1972). However, it is equally clear that an employee cannot indiscriminately invoke his First Amendment freedom as a bar to discharge for cause when his utterances become disruptive of his own work and injurious to the efficiency of his employment unit. Arnet vs. Kennedy, 416 U.S. 134, 94 Sup.Ct. 1633, 40 L.Ed.2d 15 (1974). Pickering vs. Board of Education, 391 U.S. 563, 88 Sup.Ct. 1731, 20 L.Ed.2d 811 (1968). Jensen v. Olson, 353 F.2d, 825 (ith [sic] Cir., 1965).

The most quoted opinion regarding the rights of a public employee in this regard applies a balancing test, to-wit: the test laid out in Pickering, supra is "the problem in any case is to arrive at a balance between the interests of the teacher

(herein an auditor) as a citizen in commenting upon the matters of public concern and the interests of the State as an employer in promoting the efficiency of the public service it performs throughout [sic] it [sic] employees. 391 U.S. 568, 88 Sup.Ct. at 1734."

It is no small matter when a court is asked to rule against freedom of expression, for such freedom is the basis for our type of government. The object is to arrive at a balance between the interests of a public employee, as a citizen, in commenting upon matters of a public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. See, Janusaitis v. Middlebury Volunteer Fire, etc., 607 F.2d 17 (1979); Ely v. Honaker, 451 F. Supp. 16 (1977); Smith v. United States, 502 F.2d

512 (1974); Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). Further, in balancing the above mentioned interests, the Court must construe all inferences in a light most favorable to the appellant. The specific facts to be considered in the case at bar include:

(1) The existence of some basis to Lesiak's accusations - truth or falsity.

(2) The effect on the efficiency of the Auditor's office - no phone calls or complaints from other auditees or public officials were received regarding Lesiak's revelations.

(3) Lesiak's revelations involved matters of public concern - i.e., a city's fiscal health and the duty of the State Auditor in that

regard.

(4) Lesiak would not have been discharged but for his letter and press interview.

(5) Lesiak was aware of the Auditor's "press policy."

(6) The confidentiality of the audit process.

(7) The operation of the department, requiring the cooperation of coworkers and the trust of the auditees for success.

(8) The rights of auditees to post-audit conferences - due process.

(9) Lesiak's right to have his reputation cleared, to be vindicated.

(10) The amount of involvement of the employer-employee relationship with the subject matter of the published communication.

(11) The necessity of showing that

public interests were best served by revealing the information at that time and in that fashion.

(12) The political motives, if any, of the State Auditor.

The real purpose behind Mr. Lesiak's communication with the Plain Dealer is revealed by quoting his letter.

> Opportunities never come to those who wait. They are captured by those who care to go ahead. page 56
>
> Could make me the key witness. page 43.
>
> But it was I who arrived on the scene in August . . . Now for the first time in a number of years I provided [a] CHALLENGING VOICE AND THE DEAFENING SILENCE WAS BROKEN BY ME WITH MY FIRST NEWSPAPER STORY. page 42

These matters do not show a resolute intention to comment to the media for the exclusive purpose of improving the public good but instead show a self-satisfying purpose as well. Likewise the actions of the State Auditor were, in part, solely

politically motivated. The bulk of Lesiak's statements are protected, however the first amendment is not an absolute defense to all of his actions.

The test of Pickering v. The Board, supra, is not the right of a public employee as an individual to speak out, [sic] against the right of the State to effectively administer a policy of confidentiality, but the test is the effectiveness of the employee in his continued public employment. In the case before the Court, it is apparent that Mr. Lesiak violated all the rules of confidentiality and also potentially would have violated rights of other individuals by denying them substantial due process of law. Mr. Lesiak, among other things, attempted to reveal and indicate that a finding was being made against a member of the Civil Service Commission, naming that person in-

dividually; also, a finding was going to be made against law firms in the City of Cleveland, something clearly outside of his scope and clearly not within the law. He alone made decisions regarding the legality of fact situations and moral judgment on these matters. In and of themselves, his revelations did not give rise to any adverse complaints to the Auditor himself by any other public officials. However, with respect to Mr. Lesiak and his duties to the Auditor's office, it is obvious to this Court that his professional abilities would be impaired when he would be dealing with any future auditee. Professionalism depends upon the ability to keep confidences. Once a confidence is broken, any person dealing with that individual in a degree of confidence in the future would have to be leery, and, therefore, his effectiveness is substantially

impaired.

Even when viewed most favorably toward Donald Lesiak, the above considerations weigh heavily against the employee, and tip toward justifying his discharge. There was certainly more than just a tangential involvement of the employer-employee relationship with the subject matter of Lesiak's stinging letter to the Plain Dealer. In addition, Lesiak failed to show that public interests were best served by revealing the substance of the post-audit conferences in his interview, and by naming individuals in that interview who would possibly be cited for serious misconduct when those citations were not yet reality. The determinative factors in this interest-balancing are the confidentiality of the audit process and the unique working relationship required in the Auditor's office.

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. Pickering, supra, footnote #3.

> [T]here may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse. Janusaitis, supra, at 26, fn. #12.

Lines of distinction can be drawn between the case of a teacher who challenges a school board's tax proposals and the case of a public employee, like Lesiak, who breaches employment policies and publicly charges individuals with malfeasance.

> In applying these guidelines we distinguish between the rights of a school teacher who expresses views es-

> sentially as a citizen and for whom the target is the institution or proposition rather than the person or where the person attacked is far removed from the situation (Pickering; Givhan, supra) and a fireman [herein a state auditor] who attacks verbally the very persons with whom he must function in the closest coordination. Janusaitis, id. at 26.

The Janusaitis, supra, court aptly described individuals like Donald Lesiak:

> The Court thus left open for case-by-case decision the duty of reconciling the interest of the 'whistle blowers' who, in good conscience, seek to expose inefficiency and corruption in government with the interest of the governmental employer whose daily functioning in some cases demands performance without personal friction. Janusaitis, id. at 25.

Mr. Lesiak's manner of defending himself exceeded the outer perimeter of the guarantees of the first amendment, and

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Order of the State Board of Review is affirmed.

[signature]

JAMES J. McMONAGLE, JUDGE

OPINION OF THE STATE PERSONNEL BOARD OF REVIEW
(Dated November 29, 1979)

CASE NO. 79-REM-05-0802

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Donald Lesiak,
Appellant
v.
Auditor of State,
Appellee

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

John S. Jones, Hearing Officer, respectfully submits the following report and recommendation:

This matter came on for hearing on the 13th day of July, 1979, continued on the

26th day of July, 1979, and concluded on the 27th day of July, 1979. The Appellant was present and represented by his Attorney, Crede Calhoun. Charles Mauger was the Designee of the Appointing Authority on the first and third days of the hearing, and Thomas Ferguson was present on the second day of the hearing. The Appointing Authority was represented by Alex Shumate and Robert Sherman, Assistant Attorneys General.

This hearing was on the appeal of Mr. Lesiak from his removal from the position of State Examiner Supervisor 1, effective May 4, 1979. The order of removal stated that the Appellant was guilty of insubordination, setting forth the following particulars:

> Specifically on or about May 2, 1979, you violated the Auditor of State's official policy regarding press relations. The policy expressly provides that State Examiner's [sic]

"do not discuss any audit whether in progress or completed with any member of the press. They should be courteously referred to the Auditor of State's Public Relations Department." You were generally informed of this policy at numerous State Examiner Seminars and meetings and were personally informed of this policy by your supervisors on other occasions.

These specific instances involve a three-hour interview with a Cleveland Plain Dealer reporter on or about May 2, 1979, regarding administrative procedures and policies regarding field audits of the Auditor of State's office; and your sending of written documents regarding field audits to Thomas Vail, Publisher and Editor of the Cleveland Plain Dealer without prior approval from your supervisors.

FINDINGS OF FACT

1. The Appellant was the State Examiner in Charge of the audit of Cleveland from April 1976 through January 1979. Effective February 1, 1979, the Appellant was assigned to Cleveland State University as the State Examiner in Charge of Universities for the Northeastern part of Ohio.

2. Standard procedure for field audit

reports is as follows:

(A) An audit is assigned to an Examiner by the Examiner in Charge.

(B) An audit is done and an audit report prepared in draft form.

(C) A post-audit conference is held with the Auditees and the Examiner in Charge to discuss the draft audit report.

(D) The Auditees have five (5) days to respond to the draft audit report after the post-audit conference.

(E) The report is reviewed and signed by the Examiner in Charge and then sent to Columbus for further review.

(F) The Columbus office reviews the report for mathematical and technical accuracy, legal and policy compliance.

(G) The audit is reviewed by a Deputy

Auditor.

(H) The audit report is typed up.

(I) The audit report is given to the Public Relations Department for release as an official public document of the Auditor of State.

3. An audit is not complete until it is released. Up until then, an audit is considered "in progress" and is confidential. This confidentiality extends to the post-audit conference that the Examiner in Charge has with the Auditees. Changes may occur in an audit report after it gets to Columbus.

4. The verbal policy of the Auditor's office for a number of years with respect to press relations was for Examiners not to speak with persons from the media about an audit in progress or a completed audit. An audit in progress was confidential and a completed audit "spoke for itself." The

press relations policy of the Auditor's office was reduced to writing in a manual that was distributed after the Appellant was removed in May, 1979.

5. The Appellant knew of and understood the verbal press relations policy. He had been orally admonished by Mike Kelley, acting on behalf of the Auditor, not to speak with the media after the Appellant had made statements to the press in March, 1978. The Appellant knew that the press should be directed to the Public Relations Department of the Auditor's office.

6. On December 3, 1978, the Cleveland Plain Dealer published a front page article about the possible default of the City of Cleveland. In that article, the newspaper made reference to statements attributed to the Appellant's Supervisor, Charles Mauger, concerning the Appellant's

responsibility for seeking help in his audit of the City of Cleveland from the Auditor's office in Columbus if he felt it necessary.

7. In December 1978, the Appellant asked Mr. Mauger to retract his statements as they appeared in the Plain Dealer. Mr. Mauger pointed out to the Appellant that such statements were not direct quotes, and, in any event, were not made by Mr. Mauger. Mr. Mauger denied the Appellant's request to retract the statements.

8. On January 15, 1979, the Cleveland Plain Dealer published a front page article about the assignment of a new Examiner in Charge of the audit of the City of Cleveland, William Hart, and the reassignment (transfer) of the Appellant to be Resident Examiner at the Cleveland State University. The Plain Dealer quoted Mr. Hart as saying, among other things, that

he intended to reverse the City's status from "unauditable" to "auditable."

9. In January 1979, the Appellant sent a memo to Mr. Hart and the Auditor of State, Thomas E. Ferguson, requesting them to apologize for "untrue statements" in the Plain Dealer article of January 15, 1979, and to print a retraction of those statements. Neither Mr. Hart nor Mr. Ferguson responded to the Appellant's memo.

10. The Appellant was transferred from his position as Examiner in Charge of the audit of the City of Cleveland to his position as Examiner in Charge of the audits of Universities for the Northeastern part of Ohio by the Auditor primarily because of requests made by officials of the City of Cleveland that the Appellant be reassigned.

11. In May, 1979, the Appellant sent a fifty-six (56) page letter with attach-

ments to Thomas Vail, Editor of the Cleveland Plain Dealer. The Appellant also had a three (3) hour interview with a reporter from the Cleveland Plain Dealer. The Appellant had not received permission of his Supervisor to send the letter.

12. The Appellant knew when he sent the letter in May, 1979 that the letter and the information contained in it were in violation of the press relations policy of the Auditor's office.

13. There were numerous statements in the Appellant's letter of May, 1979 that were critical of the Auditor's office as well as of specific employees of the Auditor's office.

14. There were numerous statements in the Appellant's letter of May, 1979 that concerned discussions at post-audit conferences with officials of the City of Cleveland.

15. The Appellant knew that the statements, referred to in paragraph 14 above, violated the confidentiality of the post-audit conference.

16. There were numerous statements in the Appellant's letter of May, 1979 that concerned audits in progress which had not been released to the public by the Auditor's office.

17. The Appellant knew that the audits in progress referred to in his letter of May, 1979 were not final and were subject to review and possible change through the review process in Columbus.

18. The press relations policy of the Auditor's office was not rigidly enforced where the Auditor of State felt that violations of the policy were minor.

CONCLUSIONS OF LAW

The basic arguments set forth by the

Appointing Authority are as follows:

1. There was a press relations policy which prohibited examiners from speaking with media concerning an on-going audit.

2. The Appellant was aware of such policy, having been disciplined orally for violating it once in the past.

3. The Appellant made specific statements to the press which did, in fact, violate the press relations policy.

4. The statements made to the press by the Appellant also violated the confidentiality of post-audit conferences and included statements concerning the audit of Cleveland which were not and could not have been determined to be final since the audit had not been approved by the Columbus office or the legal section of the Columbus office. Thus, the allegation by the Appellant in his letter to the Cleveland Plain Dealer that there was, in fact,

a finding for recovery against the Council and Clerk of Council of the City of Cleveland was not supported by the evidence. The draft of the audit which was submitted after the Appellant had left the City of Cleveland as Examiner in Chief stated that the expenditures were not in accordance with statute, not, as the Appellant had alleged, findings for recovery. Furthermore, the legal section of the Auditor's office had not made a determination one way or the other as to the status of such expenditures by the Council and Clerk of Council.

The arguments of the Appellant are as follows:

1. The press relations policy was vague and arbitrarily applied to protect or promote the interests of the Auditor's office. Specifically, the policy was not well defined and was used where the Audi-

tor felt that statements in the press could be detrimental to his office. Where statements were not detrimental to the office of the Auditor of State, then the Auditor would not invoke the press relations policy.

2. The press relations policy, even if known and valid, cannot be invoked to restrict freedom of speech protected under the First Amendment of the Constitution of the United States. Thus, the Appellant is free, even in the context of his work relationship with the Auditor of State, to make statements to the press concerning the audit of the City of Cleveland.

3. The Appellant had a right to clear his good name and reputation which had been damaged by the Auditor's office or employees of the Auditor's office in newspaper articles in the Cleveland Plain Dealer.

It is evident that the Appellant knew of the press relations policy of the Auditor's office and knew that he violated it when he sent his letter to the Cleveland Plain Dealer and had an interview with a Plain Dealer reporter. However, before it is possible to determine whether or not such conduct constitutes insubordination under Chapter 124 of the Ohio Revised Code, it is necessary to confront the arguments raised by the Appellant concerning his right to free speech under the First Amendment of the United States Constitution.

The Hearing Officer recognizes that an administrative agency is not an appropriate forum to determine constitutional questions. Nonetheless, the First Amendment issue presented by the Appellant cannot be sidestepped.

Although a state employee does have

First Amendment rights to make public statements concerning his employment, such rights are not absolute.

The United State [sic] Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), stated as follows:

> The state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee] . . ., as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568.

In Donahue v. Staunton, 471 F. 2d 475 (7th Cir. 1972), the Court of Appeals cited specific "interests of the state" which, under the balancing test of Pickering, would warrant discharge of an employee: The ". . . need for confidentiality . . . [and] . . . statements which impede

the employee's proper performance of his daily duties." 471 F. 2d at 481.

The Appellant admitted that his statements to the Cleveland Plain Dealer in May 1979 violated the confidentiality of the post-audiudit [sic] conferences with officials of the City of Cleveland. This alone would swing the balance in favor of the state under the Pickering test.

Further, by violating such confidences, the Appellant necessarily impeded his ability to perform his daily duties because the public officials with whom he would have to work could not have faith that the Appellant would not compromise a confidentiality of their audits in process. Without a trust relationship of some sort between an Examiner and an Auditee, an audit is seriously impaired.

As applied to the Appellant, the discipline imposed by the Auditor for violat-

ing the press relations policy did not unconstitutionally limit the Appellant's exercise of his freedom of speech.

The Appellant might argue that, even if the Auditor had the right to limit his First Amendment rights of free speech, nonetheless, the Auditor has not enforced the press relations policy uniformly. Thus, the Auditor cannot arbitrarily enforce the policy to discipline employees who are critical of his office, and allow his "favorites" to go undisciplined. The evidence at the hearing showed that the Auditor did not discipline all employees who spoke with the press. However, there was no evidence to show that any other employee of the Auditor's office who had spoken with the press had actually provided confidential inofrmation [sic] about audits in progress or post-audit conferences as the Appellant had done.

It is apparent to the Hearing Officer that the Auditor had good cause to discipline the Appellant for his conduct in May, 1979, and that such conduct constituted insubordination pursuant to Section 124.34 of the Ohio Revised Code.

There was further evidence which allowed the inference that the Auditor had removed the Appellant for political reasons (e.g., the Appellant was transferred from his position as Examiner in Charge of the City of Cleveland at the request of city officials; the Auditor testified at the hearing that the Appellant's letter to the Plain Dealer was not critical of his office, when, in fact, it was highly critical of the Auditor). However, even if the Appellant were removed primarily for political reasons, there was sufficient proof to find that the Appellant was, at least, insubordinate, and this, alone,

supports disciplinary action against the Appellant.

The Appellant has argued that he had a right to clear his good name and reputation which had abeen [sic] damaged as a result of the articles printed in the Cleveland Plain Dealer in December, 1978 and January, 1979. However, there was no evidence other than the Appellant's own testimony that his good name or reputation had been damaged in any way. Assuming, arguendo, that the Appellant's good name and reputation had been damaged to any extent, he would, indeed, have had the right to defend himself in a letter to the press. But even so, such defense should not violate confidences or discuss audits in progress. Had the Appellant limited his letter to paragraph one after "Rebuttal to Attachment No. 1" on page 3, to page 8 and to the top third of page 9, he

would have presented his rebuttal without having violated the press relations policy. Obviously, the Appellant did not so limit himself and instead appeared more interested in "promoting" himself than defending himself.

IT IS, THEREFORE, RECOMMENDED that the order of removal be AFFIRMED.

[signature]

John S. Jones

Hearing Officer

APPLICATION FOR RECONSIDERATION
FILED WITH COURT OF APPEALS OF
CUYAHOGA COUNTY
(Dated November 22, 1982)

NO. 44596

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

Donald Lesiak

APPELLANT

Thomas E. Ferguson, et al.

APPELLEES

APPLICATION FOR RECONSIDERATION

Now comes the Appellant, Donald Lesiak, and respectfully moves this Court for reconsideration of its decision issued November 10, 1982, for the reasons set forth in the accompanying Brief.

BRIEF

Reasons For Application

The reasons for this Application are multiple, even though counsel's experiences teaches [sic] him that, regardless of the judicial error involved, Ohio courts in the last 20 years have established a tradition of rarely, if ever, granting such reconsideration of their decisions or, for that matter, even addressing them other than by a one line denial.[1/]

1/ Counsel has never met a trial lawyer who, when this subject was discussed, did not believe that courts deliberately misconstrue the record and the law in order to do what they think is "just." It is submitted that this feeling is engendered by the undisputable logic of the aphorism that mistakes are corrected, whereas deliberate conduct is permitted to stand. Examples which come to mind in the Eighth Appellate District are Kihorny v. Jones & Laughlin Steel Corporation, Case No. 37225, (Appellate Court disposed of the defendant's convention that there was insufficient evidence to raise a jury question as to whether plaintiff's pre-existing diabetes was substantially

(Footnote 1 concluded on next page)

(Conclusion of Footnote 1) accelerated by an injury by converting it into the question of whether or not there was sufficient evidence for the jury to find that plaintiff had diabetes, a fact specifically conceded in the defendant's brief); Szymanski v. Halle's Department Store, Case No. 39377, (Appellate Court disposed of defendant's contention that the legislature did not intend, under the Workman's Compensation Act, to encompass psychic trauma without contemporaneous physical contact by deciding the question of whether heart attacks were intended to be compensable); Moody v. Elmer A. Keller, etc, et al., Case No. 31658, (the Court disposed of defendant's contention that the legislature, in 1959, intended to ameliorate the harsh Dripps Doctrine by doing away with a judicially imposed requirement of an external accidental means by falsely attributing to defendant the contention that, in 1959, the legislature did not intend to overrule the Dripps case); Casey v. Calhoun, Case No. 41396, (in the only known case in the history of the United States in which a trial judge, in a slander action, directed a verdict on the question of the truth, the Court purported not to understand its obligation to construe the evidence most favorably in favor of the party against whom the verdict was directed instead of the party who was the beneficiary of it.) The records in the above cases are available to the Court so they can satisfy themselves that the counsel's view is supported by the facts. These are but a few of such instances. Counsel will be glad to supply the members of the panel with other instances of this malfunction in other Appellate Districts and before the Supreme Court.

The filing of this Application is compelled by the importance of the question to the public and to Appellant, and the confidence that the members of this panel will address the questions raised.

The Mistakes And Avoidance Of The Court

There are four main legal reasons for this Application.

The first is the avoidance by the Court of Appellant's contention, conceded by the State Auditor, that his discharge could not be sustained unless there was reliable, probative and substantial evidence to support the trial judge's conclusion that his ability to efficiently perform his duties was impaired by reason of his statements with reference to pending audits.

The second reason arises because of the Court's avoidance of the first reason. Under the Federal Constitutional law, this

brings into issue whether Appellant would have been fired for his criticisms of the State Auditor regardless of his statements with reference to findings for recovery.

The third reason is the mistake of the Court in concluding that there was no indication in the record that the Auditor's office intended to cover up Appellant's investigation of the individuals involved.

The fourth reason is the failure of the Court to explain why, in the context of the record in this case, the public interest is best served by permitting the State Auditor to terminate Appellant's employment.

It is hoped that, after reading this Application for Reconsideration and the Auditor's reply, the Court will conclude that the applicable federal law applied objectively to the record in this case demonstrates that Appellant was fired, not

to preserve the ability of the State Auditor's office to enforce compliance with the fiscal requirements of the State of Ohio and the City Charter, but to preserve the Auditor's power to use his office for his own selfish political ends which cannot, by any stretch of the imagination, be considered as in the public interest.

In deciding this case, it is hoped that the members of the Court will face up to the underlying, unconscious bias inherent in a system in which judges are elected and, because of this fact, subject to the type of political power that can be asserted by the State Auditor.

I.

The Discharge Of A Public Employee For Making Statements To The Press Cannot Be Sustained Unless There Is Reliable, Probative And Substantial Evidence That Such Statements Impaired The Ability Of The State Employer To Efficiently Perform Its Public Services

At page 5 of the Court's decision, the Court constructs a straw man by attributing to Appellant a dispute as to the necessity for the policy of confidentiality with reference to employees of the Auditor's office. Nowhere in the Brief is it suggested that the Auditor of the State should not establish a policy proscribing the unwarranted disclosure of information by his employees to the press, or that such policy is not necessary to the efficient operation of the Auditor's office.

This does not mean, however, that this policy can be used to neutralize criticism and to further the Auditor's political power as shown by the record.[2/]

2/ The point which Appellant attempted to make with obvious lack of success is that the circumstances of the disclosures in this case did not impair the ability of Appellant to continue to perform his duties at Cleveland State University, or of

(Footnote 2 continued on next page)

As pointed out at page 9 of the Brief, shortly after he started, Appellant was told by the Auditor to "work the news media," together with a political operative of the Auditor. At pages 11-12 of the Appellant's Brief, it was pointed out that, in 1977, Appellant had been instructed to give information to a newspaper reporter in order to further political interest of the President of Council in a dispute with the Clerk of Municipal Court. Was the telephone call initiated

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(Conclusion of Footnote 2)
the office of the Auditor to audit state and municipal offices. Because of the overtones of the word "confidential" as it applies to doctors and lawyers in which information received by them in such relation is legislatively protected from disclosure without the consent of the patient or the client, Appellant attempted to point out to the Court that the information received by an Auditor's employee was not of this nature since it involved the business of the public.

by the State Auditor encouraging Appellant to comment on the Perk Administration, but to lay off of the Kucinich Administration, even though the Auditor admitted, at page 249 of the record, that there was an audit in progress at the time of Mayor Perk's office not worthy of mention in the context of this case?

It is submitted that the seriousness which the Auditor purports to attribute to Appellant's breach is belied by the above evidence and the Auditor's withdrawal of a previous oral warning to Appellant with the statement that Appellant should not worry about the warning and that it had only been transmitted because of a phone call from Council President Forbes (Brief page 12). If the Auditor's testimony was sincere, would not one have expected a written warning pointing out the conse-

quences of any future violations transmitted by Appellant's superiors rather than a political operative of the Auditor (BOR page 257).

The absence of any discussion by the court of the failure of the record to demonstrate that Appellant's oral statements, with reference to findings for recovery, impaired either his ability to perform his job, or of the Auditor to enforce the law and to address the legal effect of this failure as demonstrated by the seven federal cases cited by Appellant at pages 4-5 and the cases cited by the Auditor, is a cruel blow to an Appellant already subjected to two decisions avoiding the obvious failure of the evidence in this regard. Perhaps, Appellant's mistake was to assume that the requirement of showing substantial impairment was so well-estab-

lished, having been conceded by the Auditor,[3] as to require only the support of a string citation of cases which the Court would check.

Counsel will remedy this defect by briefly discussing the most pertinent of the cases cited by the Auditor.

One of the most cited cases on the subject is Smith v. United States, 502 F. 2d 512 (5th Cir. 1974) involving the discharge of a clinical psychologist at a V.A. Hospital for wearing a "peace pin." The doctor was first warned on two occasions by his supervisor and was then sent a letter of admonishment followed up by a

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[3] Auditor's Brief, page 17; "Appellee submits that the Pickering case required the lower court to determine if Appellant's statements can be reasonably shown or presumed to have impeded the efficient operation of Appellant's daily duties.***"

notice of intention to reprimand and a reprimand and finally a removal, when the doctor persisted in wearing the pin. The Court defined the legal requirement [emphasis in original] as follows:

> "***In order for the government to constitutionally remove an employee from government service for exercising the right of free speech, it is incumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment. Battle v. Mulholland, 439 F. 2d 321 (5th Cir. 1971)."

The Court found that this requirement was satisfied by the testimony of the Chief of the Medical Staff that the wearing of the pin would be harmful and odious to patients in psychological review and explained his position in great detail. The Chief of the Psychiatry service also explained that the injection of the pin into the patient-psychologist relationship could cause a great deal of time being

spent in dealing with something that might not be appropriate. From this testimony, which was set out in great detail, the Appellate Court found that it supported:

> "***the rational conclusion that the injection of the peace pin into the therapeutic environment here under consideration presented a material and substantial inference [sic; = "interference"] with the performance of appellant's duties as a staff psychologist. This is more than the 'undifferentiated fear or apprehension of disturbance' that the Supreme Court warned against in Tinker, supra. 393 U.S. at 508, 89 S.Ct. at 737, 21 L.Ed.2d at 739.***"

In Ely v. Honaker, 451 F. Supp. 16 (W.D. Va 1977), the plaintiff was dismissed as a city police officer for discussing his investigation of a prostitution ring with a TV reporter because the officer felt it was "a Big Story." The officer's dismissal was initiated by a complaint of the County Sheriff to the Police Chief. Before the dismissal, an investigation by a ranking officer concluded that the offi-

cer's conduct was "detrimental to the good order, efficiency and morale of the department."

At pages 21-22, the Court found that the plaintiff's interest, as a citizen, in publicizing the details of his pending criminal investigation "was minimal if not nonexistent," and found:

> "Moreover such publication could clearly have been expected to prove detrimental to the efficient operation of the Bristol Police Department.***"

Hanneman v. Breier, 528 F. 2d 750 (7th Cir. 1976) involved a letter to a newspaper by a policeman, violating a police department rule. The Court found that, under the circumstances, the state interests which supported the rule did not justify its application in the specific case because the ability of the Chief of Police to conduct his internal investigation in private had already been destroyed by the

publication of a newspaper article disclosing the existence of the investigation (at page 754). The dismissal was overturned.

A policeman was also involved in Kannisto v. City and County of San Francisco, 541 F. 2d 841 (9th Cir. 1976). In this case, the Court sustained a 15 day suspension of a lieutenant for "disrespectful and disparaging remarks about [a] superior officer while addressing his subordinates during morning inspection." The Court found that the lieutenant's comments were directed against one "under whose direction he worked in close daily contact." It concluded:

> "In our view there could be no reasonable doubt on Kannisto's part that a disparaging attack on his superior officer, communicated to patrolmen in the regular course of duty, would tend to 'subvert the good order, efficiency or discipline of [the] Department.' ***" (at page 845)

In Janusaitis v. Middlebury Volunteer Fire, Etc., 607 F. 2d 17 (2nd Cir. 1979), the Court upheld the discharge of a fireman, distinguishing Pickering, on the grounds that the plaintiff verbally attacked the very persons "with whom he must function in the closest coordination **** when lives may be at stake in a fire***." (at page 26) At the time of his discharge, the plaintiff had just returned from a 30 day suspension for the same kind of conduct. It concluded:

> "In this state of affairs it would be folly to presume that the functioning of the voluntary fire department would not be seriously impaired if appellant were reinstated by an order of a court.***" (at page 27)

In Phillips v. Adult Prob. Dept., City & Cty. of San Francisco, 391 F. 2d 951 (9th Cir. 1974), a probation officer placed a poster favorably depicting H. Rap Brown, Angela Davis and Eldridge Cleaver,

who at that time were fugitives from justice. Jenkins was ordered to remove the poster or face suspension. He refused to and was suspended for a period of five days. There was evidence that appellant's co-workers threatened to place upon their walls posters offensive to various other ethnic and religious groups. The Court found that the reaction of appellant's co-workers "would impair the efficiency of the department through dissention and disharmony among the employees." (page 955)

Jensen v. Olson, 353 F. 2d 825 (1965), even though it preceded Pickering, premised the rule applied on a finding that the employee's speech conduct was "disruptive of the proper functioning of the public's business."

None of these cases support the proposition that a public employee can be terminated without evidence demonstrating a

substantial impairment of his efficiency as an employee or of his department. If an Ohio court is to establish a new frontier in this federal area, it is submitted that it should recognize what it is doing and carefully discuss why the previous federal law should be disregarded.

II.

The Court Failed To Consider Whether The Evidence Showed That The Plaintiff Would Have Been Fired For His Criticisms Of The State Auditor Regardless Of His Oral Statements To The Reporter Regarding Findings For Recovery

If it is the intention of this Court in its decision to determine that the evidence showed that it is probable that the State Auditor would not have terminated Appellant except for his disclosing information about uncompleted audits to the Plain Dealer reporter, it should so state directly and find that the testimony of the Auditor standing alone, uncorroborated

by any other testimony or circumstance, should be accepted on this point, even though:

1) The Order Of Removal recited the "specific instances" justifying the removal as Appellant's "sending written documents regarding field audits" to the Plain Dealer, and a three hour interview with a reporter "regarding administrative procedures and policies regarding field audits" on May 2, 1979.

2) The absence of any testimony from any of the persons with whom the Auditor consulted before the discharge that Lesiak's statements regarding findings for recovery were even known much less considered. This included the testimony of Chief Deputy Mauger, the Auditor's Chief Legal Advisor, Joseph Willis, and his public relations officer, Fred Knippenburg. (BOR 229-230)

3) The absence of any memoranda or anything in writing even suggesting that the Auditor knew of these statements with reference to findings for recovery.

4) The lack of the Auditor's credibility found by the Personnel Board of Review Hearing Officer and Judge McMonagle with reference to the Auditor's testimony that he did not believe that the letter to the Plain Dealer was critical and that he was helpless to stop the continuing fiscal violations by Cleveland City Officials.

5) His obvious part in responding to pressure from Cleveland City Officials to transfer Appellant to Cleveland State University and then engendering a false public relations release and story to the Plain Dealer giving the impression that Lesiak had not done his job and that his successor, Mr. Hart, would.

6) The Auditor's part in presenting

obviously perjured testimony by Mr. Hart to conceal the fact that the Plain Dealer story was planted. This perjury included testimony by Mr. Hart before the Personnel Board of Review Hearing Officer that he had not realized that he was talking to a Plain Dealer reporter on the telephone, and then at trial testifying that, in fact, one of the top political reporters appeared at his home with a camera and took a picture which appeared the next day in the Plain Dealer. The Court should read Mr. Hart's testimony beginning at page 464 before the Board of Review and at page 16 before Judge McMonagle. The other conduct evidenced by the State Auditor including his calling Appellant and telling him he was free to make comments about the Perk Administration; his testimony at the hearing before the Board of Review Hearing Officer that he did not think that he had

the power to bring a court action against the City of Cleveland to require City Officials to comply with the law and that a statement in 1977 threatening to bring such an action based upon a legal memorandum by a member of his staff was "a bluff." (BOR 346-347)

In Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977), and Givhan v. Western Line Consolid. Sch. Dist., 439 U.S. 410, the Supreme Court established the principle that the trial court had to determine whether the employee would have been discharged but for the protected constitutional activity, and in both cases remanded to the Court of Appeals for further proceedings in accord with this requirement.

It is submitted that this Court should itself decide, or it should remand to Judge McMonagle to decide whether the evi-

dence demonstrates that Appellant would have been discharged even if he had not orally stated to the Plain Dealer reporter that he intended to make findings for recovery.

In this regard, it, of course, is essential to determine whether the Auditor even knew at the time that he fired Appellant, that Appellant had made these statements with regard to findings for recovery to the Plain Dealer reporter. It necessarily follows that if the Auditor did not know of these statements, it certainly could not be concluded that he would not have fired Appellant but for these statements.

Judge McMonagle's Finding No. 4 at page 9 of his decision that "Lesiak would not have been discharged <u>but for</u> his letter and press interview" does not address the question specifically posed by <u>Givhan</u>

and Mt. Healthy, which specifically stated would be: Whether Appellant would have been fired for his constitutionally protected criticism of the Auditor regardless of whether or not he made any statements to the reporter with respect to findings for recovery.

It is submitted that in this case, the Appellant sustained his burden of showing that he was fired for constitutionally protected speech by showing that the order of removal described the specific instances of his violation as "sending written documents regarding field audits" and an "interview regarding administrative procedures and policies regarding field audits" and the lack of any circumstantial or other corroboration that Appellant was, in fact, discharged for his comments regarding findings for recovery, and but for such comments would not have been dis-

charged for his protected criticism.

It is of more than passing interest to note that the Supreme Court in Givhan pointed out that the public employer in his letter to petitioner setting forth the reasons for her termination made "no mention of petitioner's 'demands and criticism.'" (439 U.S. at p. 417, n 5.)

III.

The Court In Its Decision Mistakenly Concluded That There Was No Indication That The Auditor's Office Intended to Hinder Appellant's Investigation

There is every indication in the record that the Auditor did not intend to in anyway [sic] impinge upon the freedom of the Clerk of Council, representing the Council President, George Forbes, to continue the expenditure of city funds for service contracts in flagrant violation of the requirements of City Charter, requiring that such contracts be in writing, and

that there be a certificate encumbering the funds. In the previous audit of the Clerk of Council's office, expenditures under the same circumstances had been cited as "payments contrary to statute," and in the post-audit conference, the Clerk and Mr. Forbes had been warned that these expenditures were illegal. Despite this citation and despite this warning, the Clerk deliberately continued to violate these same requirements.

The Auditor testified that despite such deliberate conduct, they did not merit a finding for recovery, as long as value in either services or goods was received. (BOR 338-344) The Deputy State Auditor, Charles Mauger[,] and Joe Willis, his Legal Officer, disagreed. (Brief, p. 22)

This circumstance goes to the very bases [sic] of the Auditor's scheme to

protect the freedom of powerful public officials to look good and fool the public by deliberately and illegally misappropriating public funds, while the Auditor stands helplessly by purporting to be unable to stop such deliberate violation of fiscal law by either a court action or anything other than another warning.

The evidence showing the Auditor's deliberate protection of the fiscal illegalities of both the Perk and Kucinich Administrations would certainly support the reasonable inference that the Auditor would not suddenly change colors and do anything to embarrass or impede the freedom of Mayor Kucinich and George Forbes to continue their deliberately illegal expenditures of public funds. The whole purpose and point of transferring Appellant to Cleveland State University was to cover up for these individuals.

The fundamental issue, of course, is whether one really thinks it is important and in the public interest to prevent such games with the public's money or, because of their background, believe this is a freedom that politicians in Ohio should continue to have.

IV.

The Failure Of The Court To Explain Why The Record Shows That The Public Interest Is Best Served By Upholding Appellant's Termination

Pages 12 to 13 of the Court's decision do not explain why, under the circumstances of this case, the public interest is best served by permitting the Auditor to justify Appellant's termination for disclosing information that, in fact, did not tarnish anyone, was not shown to be false and was not the motivating reason for the discharge. Did the court intend to say that the public interest is best

served under the circumstance of this case because it is more important to protect Mayor Kucinich, the Clerk of Council and the member of the Civil Service Commission from the possibility [emphasis in original] that their reputations might be unfairly tarnished, than it is to protect Appellant from the deliberate assasination [sic] of his competence by the false charge that he was responsible for the city's default?

Certainly the court does not believe that the efficiency of the State Auditor to enforce compliance with state and municipal fiscal laws would be strengthened by upholding the Auditor under the circumstances of this case, while to overturn the discharge would make it less likely that the Auditor would, in the future, force compliance with fiscal law. It is submitted that the decision of this court,

if not modified, will increase the efficiency of the Auditor's office to condone and protect the deliberate fiscal illegalities of powerful politicians, which efficiency could be considered as serving the public interest only by one who shares the Auditor's professed view (Appellant's Exhibit 18) that taxpayers are not concerned with whether public monies are spent "according to law."

Granting that "employees of investigative bodies may do more harm than good when they make premature allegations of wrong doing [sic] during the course of an investigation" (Court's Opinion p. 12), the Court in its decision responding to this Application should explain why it feels that Appellant did more harm than good in writing his letter and giving his interview to the Plain Dealer reporter, especially since the failure of the record

to show any harm was the main contention of Appellant in this appeal.

Respectfully submitted,

[signature]

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